

DEFAMATION ON THE NET

Introduction

A defamatory statement is one which lowers the person referred to in the estimation of right thinking members of society, or may lead to their being shunned or avoided by others. A publisher of a defamatory statement will be liable if a claimant can show that the statement refers to him; that the statement lowers him in the estimation of right thinking members of society generally; and that the person has published the statement to a third party unless he can rely on one of the available defences. This is the case whether a person who is publishing in print or online.

Publishing online does, however, create a number of potential problems over and above those faced when publishing in print.

Third Party Publication

A publisher of a magazine would not allow a letter from a reader to be published without it being vetted. In the same way, third parties should not be allowed to publish an online publication without any contributions being checked. However, many website operators will want their online publications to be interactive and will wish to include message boards and chat rooms on their sites. Both allow third parties to publish on a website operators online publication, and the website operator will be potentially liable for the material placed there by the third party, whether or not it was aware of the content of the material. This is because, as commercial publishers, you cannot rely on the so-called 'innocent dissemination' defence introduced by section 1 of the Defamation Act 1996.

Hyperlinks

Another form of third party publication that needs to be carefully considered is the use of 'hyperlinks' to other sites. An online publisher is potentially liable for any defamatory material on the page to which the hyperlink takes the user on the other site. In this respect the user need to be careful that the content of the page that the user is linked to does not change without the user's knowledge. A suitably worded disclaimer which is prominently presented to the user in relation to the hyperlink may assist in this regard.

Liability of Internet Service Providers

Unless it can rely on the 'innocent dissemination' defence referred to above, the Internet service provider (ISP) will face potential liability for any defamatory statements that a website operator publishes. This means that in certain circumstances the ISP will attempt to influence the content of the online publication under threat of closing the site down.

For an ISP to be able to rely on the 'innocent dissemination' defence it will have to be able to show that it:

- (a) is not the author, editor or publisher of the statement complained of;
- (b) has taken reasonable care in relation to its publication; and
- (c) did not know, and had no reason to believe, that what he had caused or contributed to the publication of the defamatory statement.

The ISP will usually be able to show that it is not the author, editor or publisher. If the ISP has not been notified of a complaint, or if they do not suspect that a particular site carries defamatory material, they will also be able to satisfy (a) and (b) above. This position changes in relation to (b) if a complaint is received. An ISP that ignores a complaint faces potential liability (the most important case to date on this area of law is *Godfrey v. Demon Internet* where Demon were

unable to rely on the 'innocent dissemination' defence because they had received a complaint about the material posted but had done nothing to ensure its removal). As the law stands, if an ISP receives a complaint it may insist that the website operator removes the statement complained of. If an ISP receives a number of complaints about the website operator, it may suspect that the website operator publishes defamatory statements, and the position changes in relation to (c) and the ISP may decide that it is not worth the risk of hosting your online publication.

World Wide Publication

Publishing online will effectively be publishing to the world. The basic rule is that the place of publication is where the material can be read by a third party. This means that if a person publishes a defamatory statement on the Internet, they are potentially going to be at the mercy of any number of legal jurisdictions, which have different legal rules. A bonus for English publishers is that they are already publishing in a jurisdiction with defamation laws that are seen as claimant friendly. Thus if a person takes care to avoid falling foul of English defamation law, they stand a good chance of avoiding claims in other jurisdictions.

If a person is particularly keen to build relationships and business links in certain countries, it may be worth the time and effort of finding out something about that country's defamation laws.

As well as falling foul of laws in other jurisdictions, world-wide publication via the Internet could bring attention to an article that would otherwise have gone unnoticed. It is well known, for example, that many US celebrities will not sue for libel in their own country because the US public figure defence puts the onus on them to prove damage and malice. This is not the case in the UK, and many US public figures are becoming aware of this fact. If a person is publishing in the United States, some may take the chance to vindicate their reputation by suing here. It is the nature of the Internet that those who use it target information about the subjects or people they are interested in and then pass that information on. If a person is publishing a cutting article about an American celebrity they can almost guarantee it will become common knowledge amongst their fans and, probably, advisors in a very short time.

Executive Summary

- Third party contributions should be checked for defamatory statements before being published online.
- Check the content regularly of any site that a hyperlink from your site takes you to as you could be liable for any defamatory material on that page. Inserting disclaimers onto site terms may assist.
- ISPs may be liable for defamatory remarks where a complainant has notified an ISP, and the ISP ignores it.